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Supreme Court, U.S.
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No. 88-85

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN PILAROWSKI
Petitioner,

v.

MACOMB COUNTY
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT MACOMB COUNTY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether Macomb County can be held vicariously liable under 42 U.S.C. §1983 for approving a budgetary reduction which resulted in the economic layoff of several employees, including Petitioner where certain individuals who were non-policymakers and were non-parties to the action arguably had a personal animus toward Petitioner.

II.

Whether Petitioner can sustain a claim under 42 U.S.C. §1983 where he is collaterally estopped from challenging the neutral reason for his economic layoff.

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RESPONDENT MACOMB COUNTY'S BRIEF IN OPPOSITION

Respondent Macomb County respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Sixth Circuit Court of Appeals decision. This case presents no special or important reasons justifying the grant of the petition and, therefore, does not satisfy the threshold considerations governing review on certiorari as set forth in Rule 17 of the Rules of this Court.

STATEMENT OF THE CASE

Petitioner commenced this employment discrimination action, pursuant to 42 U.S.C. §1983, against the Macomb County Health Department and the Macomb County Board of Commissioners (collectively "Macomb County") alleging that he had been discharged from the Health Department for exercising his First Amendment right to freedom of speech. The County has, at all times, asserted that Pilarowski, along with several other employees, was laid off due to a growing budgetary deficit at the Health Department and that the County Board of Commissioners, acting without knowledge of which individuals would be affected, voted to reduce budgetary expenditures.

Unlike Petitioner's Statement of the Case,[1] the procedural history and factual setting of this matter is succinctly and accurately set forth in the Sixth Circuit's Opinion appended to the Petition (Pet. App. A-1 - A-6).

REASONS FOR DENYING THE WRIT

1. This case, as aptly described by the district court and as affirmed by the Court of Appeals, is one where the Petitioner impermissibly pursued a "classic *respondeat superior* liability" theory against Macomb County (Pet. App. A-40).[2]

Now, in an effort to frame an issue worthy of Supreme Court review, Petitioner asserts that the decisions below improperly hinged upon the fact that the Board of Commissioners did not "formally acknowledge" that Macomb County had a policy of suppressing free speech (Pet. 14, 16) and that a majority of the Board of Commissioners acted "with knowledge" (Pet. 13, 22, 23) of the "nefarious purpose" of certain individuals. Such an effort miscasts the decisions below, exaggerates the record below and is nothing more than a last ditch effort to defend the tactical decision not to sue certain county officials individually.

It is not a matter of great disagreement that if a municipal policymaking body acted with the intent to knowingly curtail the constitutionally protected right of an individual whether formally or informally, then a §1983 action would lie. That is simply not the case here.

There is no evidence that the policymaking body of Macomb County — the Board of Commissioners — had any intent or design to curtail the Petitioner's First Amendment rights to

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[1] Rather than setting forth a *concise* statement of the case, Petitioner attempts to re-argue the facts as presented on appeal to the Sixth Circuit (Pet. 4, fn. 2). In so doing, he omits facts (i.e., the impact of Michigan's new Public Health Code and the post-layoff administrative proceedings) and, in other instances, unjustifiably overstates other facts (i.e., the knowledge and awareness of Board members) material to the consideration of the questions presented.

[2] Petitioner has incorrectly reprinted the district court's Memorandum Opinion and Order to state that "*respondeat superior* liability . . . is permissible" rather than "impermissible" as in fact the district court's Opinion states (Pet. App. A-40).

freedom of speech when it voted to correct a budgetary deficit.[3] The budgetary reports prepared by Health Department administrators did not contain the names of the employees to be laid off, no commissioner requested the names of the individuals to be laid off, and the resolution approving the amended budget likewise contained no names of affected personnel (Pet. App. A-4, A-34 - A-35).

In support of his contention that the Board of Commissioners had "knowledge of" the alleged "nefarious purpose" of certain individuals, Petitioner, as he did below, relies upon a purported conversation between two Commissioners about "getting rid of" him which was allegedly overheard by a third Commissioner over eight months before the entire Commission considered the amended budget (Pet. App. A-3, A-39). There was no evidence presented that any of the remaining twenty-two Commissioners heard the purported conversation much less knowingly acted upon it. *See Pembaur* v. *City of Cincinnati,* 475 U.S. 469, 483 (1986) ("municipal liability under §1983 attaches where — and only where — a *deliberate* choice to follow a course of action is made") (emphasis added); *see* also, *Oklahoma City* v. *Tuttle,* 471 U.S. 808, 823 (1985) (" 'policy' generally implies a cause of action *consciously* chosen from among various alternatives") (emphasis added; footnotes omitted).

Similarly, the decisions below did not hinge upon whether there was a "formal acknowledgement" by the Board of Commissioners of an unconstitutional municipal policy.[4] The decisions below hinged upon Petitioner's inability to "present credible proof that the decision to discharge him was made 'by reason of his exercise of constitutionally protected First Amendment freedoms' " (Pet. App. A-6) . . . an insufficient record "to support a

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[3] On the contrary, Petitioner's witness, Commissioner Dilber, voted to approve the budget adjustment and, in essence, caused Petitioner's layoff whereas Commissioner Grove allegedly hostile to Petitioner, voted not to cut the existing budget and, in essence, to maintain Petitioner's position (Pet. App. A-4, fn 2).

[4] The Sixth Circuit decision is likewise not inconsistent with the results of those cases cited by Petitioner at pages 19-20 of the Petition. The common thread of all the cases upon which Petitioner relies is that each case is fact specific in its application of *Monell* v. *New York City Dept. of Social Services,* 436 U.S. 658 (1978).

conclusion that *the Board's action* . . . was motivated by Pilarowski's letter writing activity . . ." (Pet. App. A-9) (emphasis in original).

This case is simply one where Petitioner failed to sustain his burden of proof and rests upon its own peculiar facts. It presents no special or important matter requiring Supreme Court review.

2. The application of collateral estoppel presents an independent basis upon which this Court can deny the petition.

Following his layoff, Petitioner filed an unfair labor charge with the Michigan Employment Relations Commission (MERC) which afforded him an adversarial hearing before an administrative law judge. Petitioner was represented at that hearing, witnesses testified, exhibits received into evidence and a full record transcribed. The MERC administrative law judge rendered a decision in favor of Macomb County finding in part that "[t]he record establishes that there was a need for economy on the part of the County . . . an absence of evidence of animosity towards [Petitioner] . . . the elimination of [Petitioner's position] was the result of County reorganization . . ." (Pet. App. A-5). Petitioner did not challenge these findings nor appeal the MERC decision to the Michigan Court of Appeals as he had a statutory right to do under Michigan law.

Under Michigan law, an unappealed MERC decision has preclusive effect. *See Senior Accountants* v. *City of Detroit,* 399 Mich. 449, 249 N.W.2d 121 (1976). Respondent contended in the district court that the unappealed MERC decision had preclusive effect and collaterally estopped Petitioner from challenging the neutral reason (i.e., the Health Department's budgetary shortfall) for his layoff (Pet. App. A-44 - A-46). While Respondent's Motion for Summary Judgment was pending, the Sixth Circuit decided *Elliott* v. *University of Tennessee,* 766 F.2d 982 (6th Cir. 1985), holding that a state administrative decision unreviewed by a state court is not binding on a federal court considering a §1983 claim. Based on that decision, the district court denied Respondent's motion.

During the pendency of this action on appeal but before oral argument in the Sixth Circuit, this Court reversed the *Elliott* decision holding that "federal courts *must* give the [state]

agency's factfinding the *same preclusive effect* to which it would be entitled in the State's courts." *University of Tennessee* v. *Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 3227 (1986) (emphasis added; footnotes omitted). At oral argument, the panel, *sua sponte*, raised the issue of collateral estoppel and its application to the MERC decision, as discussed above, and requested supplemental briefs on the issue.

As explicitly recognized by the majority opinion and implicitly by the dissenting opinion below, the collateral estoppel argument has "considerable merit" in light of this Court's decision in *Elliott* (Pet. App. A-10 - A-13) and presents this Court with an independent rationale to deny Petitioner's application for a writ.

CONCLUSION

This case is one in which Petitioner simply failed to produce sufficient evidence to establish an alleged violation of 42 U.S.C. §1983. There is here presented no conflict with the decision of another Court of Appeals on the same matter, no important question of federal law which should be settled by this Court, and no conflict with applicable decisions of this Court. The instant case was properly decided upon its peculiar facts.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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